NO. 80-1123

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IN THE

Supreme Court of The United States

October Term, 1980

DAVID SAYE and EDWARD T. KASSINGER,
Petitioners,

v.

LARRY WILLIAMS,
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioners proffered sufficient evidence to support a defense of "official immunity."

2. Whether the disclosure of a public accident report constitutes protected activity under the First Amendment to the United States Constitution.

3. Whether the evidence supported the jury award of compensatory damages.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are relevant but were not cited by petitioners:

Ga. Code Ann. § 40-2701 — Right of Public to Inspect Records.

> "All State, county and municipal records, except those, which by order of a court of this State or by law, are prohibited from being open to inspection by the general public, shall be open for a personal inspection of any citizen of Georgia at a reasonable time and place, and those in charge of such records shall not refuse this privilege to any citizen."

Ga. Code Ann. § 68-1606 — Provisions of Law Uniform Throughout State.

> "The provisions of this law (Chapters 68-15 through 68-17; §§ 68-9926, 68-9927) shall be applicable and uniform throughout this State and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance, rule, or regulation in conflict with the provisions of this law, unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this law."

Rules of the Department of Public Safety.

> "570-2-.01 — Public Availability of Accident Reports, Amended.
>
> (1) Uniform traffic accident reports which are prepared by or submitted to the Department are public records and shall be available for inspection during normal working hours at Department of Public Safety Headquarters. If copies of such reports are located at any State Patrol Post, they shall be made available for public inspection there. Copies of uniform traffic accident reports may be purchased from De-

partment of Public Safety Headquarters for a fee of $2.00 per report."

Georgia Uniform Motor Vehicle Accident Report Instruction Manual.

"Item 34 — The driver's sobriety should be recorded even though a test may not have been administered. If under the influence of alcohol mark Number 4. If under the influence of drugs mark Number 6.

Item 57 — Write any remarks that would serve to clarify any matter, or that seem necessary to supplement any part of the report. If the size of the 'Remarks' section is insufficient to contain what you write, write 'cont'd.' on the last line and conclude on a plain piece of stationery which should be attached to your report, and numbered 'page _____ of _____ pages.' Include accident number, county and date of accident on any supplemental pages. Typewritten remarks may be single spaced, getting two typed lines per line on the report."

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STATEMENT OF THE CASE

Petitioners are the Chief of Police and the Director of Public Safety of the University of Georgia. Respondent was a lieutenant under petitioners' supervision.

In April, 1976, respondent decided to offer as a candidate for the office of Sheriff of Clarke County, Georgia. (Vol. II, Tr. 27). University policy encouraged political

activity by its employees (Vol. II, Tr. 28). University employees had held public office in the past (Vol. II, Tr. 28-29) and both petitioners had actual knowledge that respondent's candidacy was both legal and consistent with University policy. (Pl. Ex. 10, Vol. II, Tr. 248, 270-71, 144; Vol. III, Tr. 311). Nevertheless, on May 3, 1976, petitioner Kassinger directed respondent to resign his position if he insisted upon seeking office because his candidacy was violative of Kassinger's "personal policy." (Pl. Ex. 12, Vol. II, Tr. 29-30, 69-70, 143, 275; Vol. III, Tr. 306, 308-312). Thereafter, on May 11, 1976, and again on May 25, 1976, petitioner Saye insisted that respondent voluntarily reduce himself in rank without a guarantee of reinstatement in the event of an unsuccessful campaign. (Vol. II, Tr. 30-31, 54, 70, 144-145, Pl. Ex. 10).

On May 14, 1976, Winfred "Tate" Brown, Chief of Police of Clarke County, Georgia, drove his police vehicle into the rear of an automobile occupied by Cindy Ruth Bray, Brian Travis Bray, Katherine O. Allen, and Ronald Steve Bray. (Vol. II, Tr. 93-94, 97, 114). Immediately after the collision, witnesses smelled alcohol in the police vehicle and on the breath of Chief Brown. (Vol. II, Tr. 13, 16, 18; Vol. V, Tr. 94-95). Since the accident occurred on the University of Georgia campus, respondent, the shift lieutenant then on duty, dispatched a patrol officer to investigate the accident. (Vol. II, Tr. 33-34). Upon his arrival at the scene, Officer Gene Brewer noted an odor of alcohol about the person of Chief Brown. (Vol. II, Tr. 39; Vol. V, Tr. 115; Pl. Exs. 1, 2). Officer Brewer ordered that the parties, including Chief Brown, be transported to a hospital where he intended to require the administration of a blood-alcohol test to determine the level of intoxicity of Chief Brown. (Vol. II, Tr. 60-61; Vol. V, Tr. 116). Chief Brown resisted the suggestion that he be transported by ambulance to a hospital despite the presence of a serious laceration to his forehead. (Vol. II, Tr. 115; Vol. V, Tr. 60). Instead, he radioed his own department

for assistance (Vol. V, Tr. 71) in disregard of departmental policy prohibiting investigation of automobile accidents involving department vehicles. (Brown Deposition Tr. 80, 85). Officer Sam Cruce of the Clarke County Police Department responded, conferred with Brown and advised Officer Brewer that he would transport Brown to St. Mary's Hospital. (Vol. II, Tr. 116). Officer Brewer then transported the remaining accident victims to St. Mary's Hospital and found that Brown had not arrived. (Vol. II, Tr. 116, 117). Brewer immediately contacted the Clarke County Police Department radio dispatcher in a futile attempt to locate Brown. (Vol. II, Tr. 116-117). Brewer then returned to the University of Georgia Police Department to report to his superior, the respondent. (Vol. II, Tr. 117).

Respondent directed Officer Brewer to prepare an accident report "as fully and objectively as possible." (Vol. II, Tr. 39, 118, 120, 149). Utilizing the instructions contained in the Georgia Uniform Motor Vehicle Accident Report Instruction Manual (Pl. Ex. 7), Brewer prepared Accident Report No. 76-1987 (Pl. Ex. 2; R. 77-84; Vol. II, Tr. 118-118).

The Georgia Uniform Motor Vehicle Accident Report contains, *inter alia,* a space composed of six blocks indicating categories of driver sobriety. (Pl. Exs. 1, 2, 7). These categories are as follows: (1) Not drinking, (2) Drinking, not impaired, (3) Drinking, not known if impaired, (4) Under influence alc/drugs, (5) Not known if drinking, (6) Blank. Item 34 of the Georgia Uniform Motor Vehicle Accident Report Instruction Manual relates to this section of the report. It directs the investigator to record the sobriety of the driver even though a test may not have been administered. (Pl. Ex. 7). Officer Brewer followed that instruction and marked Block 3 (Drinking, not known if impaired) to record his observations concerning Brown's sobriety. (Vol. II, Tr. 118-119). In addi-

tion, he attached a narrative supplemental objectively recording his factual observations of the circumstances supporting his judgment as to Brown's sobriety. (Vol. II, Tr. 120-121). This narrative was required by Item 57 of the Uniform Motor Vehicle Accident Report Instruction Manual which directs the investigating officer to record any remarks which are necessary to clarify any matter, "or that seem necessary to supplement any part of the report." (Pl. Ex. 7). After completing his final report (Vol. II, Tr. 119), Officer Brewer submitted it to respondent for his approval. (Vol. II, Tr. 40). Respondent reviewed the report, affixed his signature to indicate his approval (Vol. II, Tr. 40, 41), and placed it under some papers on petitioner Saye's desk pursuant to the latter's instructions (Vol. II, Tr. 39, 195).

On May 16, 1976, Winfred "Tate" Brown and petitioner Saye met in Saye's office at the University of Georgia Police Department. (Vol. II, Tr. 152). The investigation of the May 14, 1976, automobile accident was discussed and Brown admitted to Saye that he had consumed "a couple" of drinks containing alcohol prior to the accident. (Vol. II, Tr. 130-131, 174, 191). Officer Brewer was then contacted by telephone and ordered to meet with Saye immediately. (Vol. II, Tr. 121-122). Upon arrival, Brewer was offered an explanation by Brown of his actions subsequent to the May 14th automobile accident. (Vol. II, Tr. 123). Officer Brewer considered Brown's explanation, including his admission, and concluded that the report which had been filed was accurate. (Vol. II, Tr. 125). Nevertheless, after Brown's departure, Saye directed Brewer to change the report so as to delete all reference on the report to Brown's condition of sobriety at the time of the accident. (Vol. II, Tr. 123-125, 175-177). Saye had never caused an accident report to be altered in such a manner prior to this incident. (Vol. II, Tr. 251). The method utilized to alter the report is illuminating as to petitioner Saye's state of mind at that time. In an ob-

vious effort to obscure these acts, the following steps were taken: (1) The "x" which had been placed in Block "3" (Drinking, not known if impaired) of the driver sobriety section of the report was removed with a white liquid typewriter erasure (the lines of the block being carefully redrawn), and an "x" was then placed in Block "5" (not known if drinking) of that section. (Vol. II, Tr. 123-12). (2) The notation "See Supplemental" was removed with the liquid typewriter erasure, and a sanitary word description of the accident was substituted. (Vol. II, Tr. 123-125). Additionally, the notation indicating that Brown was not carrying an insurance identification card was deleted in its entirety.

The following day, photostatic copies of the report, without supplementals, were released to the accident victims and forwarded as official records to the Accident Reporting Unit of the Georgia Department of Public Safety. (Pl. Ex. 5, Pl. Ex. 6; Vol. II, Tr. 99-101, 103, 105-106, 113, 232-233). These copies appeared to be unaltered copies of the original since the copying equipment did not show the existence of the white liquid typewriter erasure (Pl. Ex. 5, 6). Respondent's signature appeared as the approving officer although he was not advised of the alterations. (Vol. II, Tr. 45-47, 232-233).

On May 17, 1976, respondent was advised by Officer Brewer of the circumstances surrounding the meeting of May 16, 1976, and the alteration of the accident report. (Vol. II, Tr. 47). As a result of this conversation, respondent contacted an accident victim and obtained a copy of the report which had been released to her. (Pl. Ex. 5; Vol. II, Tr. 47-48). By simply comparing that report with a copy of the original which he had routinely retained for his files, respondent readily corroborated the information that he had received from Officer Brewer. (Vol. II, Tr. 48).

Respondent wrote a letter of protest to petitioner Kassinger. (Pl. Ex. 3). Upon delivery of the letter to petitioner Saye to be forwarded to petitioner Kassinger, Saye stated to respondent that the supplemental had been withheld because it was embarrassing to the department and that the report had not been altered. (Vol. II, Tr. 88).

Meanwhile, respondent had shown the reports to his father, William L. Williams, a professor of biochemistry at the University. (Vol. II, Tr. 53-55). Respondent's father gave copies of both the original and altered reports to Pete McCommons, a reporter for the Athens Observer, a local weekly newspaper. (Vol. II, Tr. 133-135).

On May 26, 1976, Pete McCommons interviewed petitioner Saye in an effort to confirm the alteration of the report. (Vol. II, Tr. 181-183). Petitioner immediately reported this development to petitioner Kassinger who in turn ordered a meeting for that night to interrogate respondent. (Vol. II, Tr. 182). Petitioner Kassinger had previously been briefed by petitioner Saye as to the alterations in the accident report. (Vol. II, Tr. 55, 294).

At approximately 10:45 p.m. on May 26, 1976, petitioner Kassinger, petitioner Saye, and David Morris, Assistant Chief of Police, met at the University of Georgia Police Department. (Vol. II, Tr. 183). Respondent had called in sick so he was contacted by telephone and ordered to appear in Saye's office. (Vol. II, Tr. 56-57, 181-183). While awaiting his arrival, Saye, Morris and Kassinger, a law school graduate (Vol. III, Tr. 314), examined the Georgia Criminal Code in a vain attempt to locate a criminal statute prohibiting the release of Georgia Uniform Motor Vehicle Accident Reports. (Pl. Ex. 13; Vol. II, Tr. 294-295).

At approximately midnight, respondent arrived accompanied by his father. (Vol. II, Tr. 57, 135, 183-184). He was immediately interrogated by both petitioners as

to his knowledge of the circumstances surrounding the release of the accident reports to the news reporter. (Vol. II, Tr. 59, 183-184). During this questioning, respondent's father interrupted to advise that he had given the material to the reporter. (Vol. II, Tr. 60, 184). In response, petitioner Saye pounded his desk and threatened respondent's father, angrily warning that "I'll whip your ass," and sue "in every court in the land." (Vol. II, Tr. 60-61, 135-136, 186). Petitioner Kassinger then angrily announced that respondent was fired, that he was a "disgrace," and that the Georgia Bureau of Investigation would be contacted to initiate a criminal investigation. (Vol. II, Tr. 61-62, 139). The following day, petitioner Kassinger requested a GBI investigation of respondent (Pl. Ex. 13; Vol. III, Tr. 313) despite his actual knowledge that respondent's actions did not violate state law. (Vol. II, Tr. 294-295).

The following day a headline story in the local newspaper announced respondent's firing with quotes from petitioner Saye attributing respondent's actions to political motive. (Pl. Ex. 4). As a result of the firing and the attendant publicity, respondent's campaign for public office was damaged to the point of total suspension of campaign activities. (Vol. II, Tr. 63, 137).

This action was initiated on June 4, 1976, by the filing of a complaint (Vol. I, p. 12) under the authority of 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 (3) and (4), and 1331 (a).

The complaint alleged, in essence, that plaintiff's public employment had been terminated for two constitutionally impermissible reasons, to-wit: (1) plaintiff had decided to seek elective office, and (2) plaintiff had disclosed evidence of official misconduct on the part of various police officials. (Vol. I, p. 16). Plaintiff sought injunctive and declaratory relief, and money damages. (Vol. I, pp. 17-18).

An evidentiary hearing on the application for injunctive relief was conducted on June 7, 1976. (Vol. V). At the conclusion of the hearing, the court announced its findings of fact and conclusions of law as contemplated by Rule 65, Federal Rules of Civil Procedure (Vol. I, pp. 31-40). The court balanced the asserted interests (Vol. I, p. 32), and found: (1) that University of Georgia Police Chief David Saye had engaged in official misconduct by causing the material alteration of an accident report which implicated the Chief of Police of Clarke County, Georgia, in possible criminal violations of the laws of Georgia (Vol. I, pp. 34-36); (2) that the material alteration of the accident report was a violation of state law (Vol. I, p. 35); (3) that University of Georgia officials, acting with the intent to withhold information concerning these incidents from other law enforcement agencies, indicated to University police employees that disclosure of this misconduct would violate the confidentiality of accident reports (Vol. I, p. 36); (4) that the plaintiff was terminated solely because of his public disclosure of evidence of official misconduct, which could not, consistent with the First Amendment and applicable State law, be protected by any policy of confidentiality (Vol. I, pp. 36-37); and (5) that University officials had misused personnel policies in an attempt to suppress plaintiff's exercise of his First Amendment right to seek elective office with the intent to damage his campaign (Vol. I, pp. 37-38). The court then ordered restoration of the status quo pending final judgment by requiring plaintiff's immediate reinstatement to his public employment. (Vol. I, pp. 39-40). The court had concluded (1) that plaintiff was likely to prevail on the merits of his claim (Vol. I, p. 38); (2) that plaintiff would suffer irreparable harm if the injunction did not issue (Vol. I, p. 38); (3) that the harm to plaintiff if the injunction did not issue outweighed any harm to defendants caused by issuance of the injunction; and (4) that the grant of the injunction was in the public interest (Vol. I, pp. 38-39).

The defendants took no appeal from the order of immediate injunctive relief.

On November 2, 1976, defendants proffered evidence attempting to show the existence of an internal policy classifying Georgia Uniform Motor Vehicle Accident Reports as confidential. (Vol. IV). This policy was supposedly promulgated in September, 1975, by a former employee (Vol. IV, Tr. 30, 35) who delegated the purported authority to his secretary to examine the reports and determine what information would be classified as confidential and therefore withheld from the Georgia Department of Public Safety and the public. (Vol. IV, Tr. 30-31, 34). The secretary was provided with no guidelines for classification of the information on the forms, leaving this delicate function to her unfettered discretion. (Vol. IV, Tr. 22-23). This supposed policy was never written nor communicated to any of the line officers or other University employees except the secretary. (Vol. IV, Tr. 37, 38, 39, 78-79).

After hearing the evidence, the district court concluded: (1) There was not in fact an internal policy of confidentiality as alleged by defendants (Vol. IV, Tr. 104); (2) Georgia Uniform Motor Vehicle Accident Reports are public records as a matter of state law (Vol. IV, Tr. 103); (3) the alleged policy of confidentiality as described would be too vague to be constitutionally enforceable (Vol. IV, Tr. 103); and (4) even if such policy were legal and specific enough to be enforced, it would not outweigh the public interest in the disclosure of information concerning the material alteration of official public documents (Vol. IV, Tr. 103-104). Thus the court excluded evidence of the alleged "policy" pursuant to Fed. R. Evid. § 401.

The issues were tried before a jury from November 30, 1976, to December 1, 1976 (Vols. II, III), and a verdict in plaintiff's favor for nominal, compensatory and punitive

damages was returned on December 2, 1976 (Vol. I, p. 212).

The defendants sought review. *Williams v. Board of Regents of the University System of Georgia*, 629 F.2d 1350 (5th Cir. 1980). The Court of Appeals synthesized three essential arguments from a plethora of "issues" urged by the appellants. The court treated issues raised by (1) the exclusion of the alleged "policy of confidentiality" and the "official immunity" defense assertatively premised thereon, (2) the rejection of the so-called *Pickering* defenses, and (3) appellee's entitlement to the damages which were awarded by the jury. Other claims of error did not merit discussion in the opinion.

The court determined that the exclusion of the alleged "policy of confidentiality" was permissible under Fed. R. Evid. § 401 as being irrelevant, that is, of no consequence to the determination since reliance on the policy would not constitute a defense. The court noted that the so-called "policy of confidentiality" could not be relied upon by the appellants since it was contrary to state law. This factor alone sustained the trial court's discretionary determination that evidence of the alleged "policy of confidentiality" was inadmissible. Nevertheless, the Court of Appeals noted that additional factors supported the exclusion of this evidence: the alleged policy was never communicated to the appellee, it was vague as a matter of law because it was neither expressly formulated nor consistently applied, and it could not in any event be utilized to shield the malfeasance of public officials which had been determined as an undisputed nontriable *fact*.

Next, the Court of Appeals reviewed the district court's application of the balancing test mandated by *Pickering v. Board of Education*, 391 U.S. 563 (1968), for determining whether speech of a public employee is protected by

the First Amendment. Viewing the evidence in the light most favorable to appellants, the court arrayed the threat of disruption, disharmony, and breakdown of discipline against the fact that the communication concerned a matter of grave public concern which was of particular significance to the appellee because the *falsification* of an official document appeared to carry his imprimatur so that he was implicated in the official fraud. Under all of the circumstances, including the practical inability to achieve an internal remedy and the reasonable "time, place and circumstances" of the disclosure, the Court of Appeals agreed that the balance could not have been struck in the appellants' favor. Therefore, evidence of the so-called *Pickering* defense was irrelevant. It would have been confusing and misleading to place such evidence before the jury, since it would not constitute a defense.

Next, the Court of Appeals determined that the evidence failed to demonstrate a sufficient basis to submit the "official immunity" defense to the jury. Specifically, the court found that reliance on the alleged "policy of confidentiality" would not suffice to frame an issue of fact which would constitute a defense. The court held that the evidence clearly demonstrated a malicious intent to injure the appellee so inconsistent with good faith that no reasonable jury would have held otherwise. Noting that *Wood v. Strickland*, 420 U.S. 308 (1975), required both objective and subjective good faith to raise the "official immunity" defense, the Court of Appeals determined that it was unnecessary to address the appellants' comprehension of the legal consequences of their actions. This conclusion flowed from the undisputed evidence of a malicious intent to injure the appellee. Malicious intent to injure having been proved as a matter of law, appellants failed to frame a jury issue as to the subjective prong of the *Wood* test.

Finally, the Court of Appeals found ample evidence to support the award of both compensatory and punitive damages. Specifically, the court affirmed the compensatory award for mental anguish resulting from the publicity, manner of firing, and impact upon appellee's political campaign. Respecting punitive damages, the record was undisputed that the appellants had falsified official records and had retaliated in a vicious manner against appellee when he disclosed this shocking act of official malfeasance.

Appellants sought rehearing which was denied *en banc*. *Williams v. Board of Regents of the University System of Georgia, et al.*, 629 F.2d 1350 (5th Cir. 1980).

Petitioners now seek review here, urging error in the repudiation of their official immunity and *Pickering* "defenses" and in the award of compensatory damages.

REASONS FOR DENYING THE WRIT

1. Petitioners failed to proffer a sufficient evidentiary basis to support an "official immunity" defense.

As noted by the Court of Appeals, *Wood v. Strickland,* 420 U.S. 308 (1975), established a disjunctive two-pronged test for determining official immunity. Specifically, in § 1983 litigation, an official is not immune from liability from damages: (1) if he knew or reasonably should have known that the action which he took would violate the constitutional rights of the plaintiff, or (2) if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to plaintiff. The Court of Appeals found it unnecessary to consider the objective prong of the test because the appellants had failed to raise a triable issue respecting the subjective prong, there being no conflict in the evidence as to the malicious intent of the petitioners to cause "other injury" to appellee. While it may not be necessary to decide, it is respectfully urged that petitioners failed to satisfy either prong of the official immunity test as a matter of law.

The petitioners failed the objective test because, assuming *arguendo* that they did not actually know that their actions would violate the constitutional rights of the respondent, each petitioner should have known that the deprivation of respondent's employment because of his disclosure of their wrongdoing was unjustifiable on the basis of an alleged "policy of confidentiality" which was clearly contrary to state law. Petitioners have pointed to no state law or other legal basis which would preclude the disclosure of the accident report in question. To the

contrary, state law is manifestly clear that the accident reports in question are public records which are available for public inspection. Under Georgia law, all state, county and municipal records are available for public inspection. Ga. Code Ann. § 40-2701. With specific reference to Georgia Uniform Traffic Accident Reports, Ga. Code Ann. § 68-1606 requires uniformity throughout the state and prohibits local ordinances, rules, or regulations in conflict with the uniform system. Ga. Code Ann. § 68-1624.1 requires the Department of Public Safety to promulgate uniform rules and regulations to be used by *all* police officers within the state. Furthermore, implementing the right of citizens to make public inspections, the Department of Public Safety promulgated Rule 570-2-.01 which makes uniform traffic accident reports available for public inspection and copying. Thus, objectively viewed, the petitioners should have known that their reliance upon an alleged "policy of confidentiality" would not justify firing and stigmatizing respondent in the manner shown.

Moreover, respecting respondent's right to seek elective office, both petitioners admitted actual knowledge that respondent's candidacy violated neither state law nor university policy. Nevertheless, undisputed evidence shows that petitioners retaliated against respondent because of his political activity. Thus, it would appear as a matter of law that the petitioners have utterly failed to demonstrate any basis which would support a finding of objective good faith.

Turning to the subjective prong of the *Wood* test, it is apparent that the evidence of subjective bad faith on the part of the petitioners was overwhelming. Indeed, it is noteworthy that petitioners do not at this juncture challenge the award of punitive damages which the jury assessed against them. Thus, petitioners tacitly admit that the evidence supported the jury finding of bad faith.

The *sine qua non* of the official immunity defense is good faith. It is incredulous that petitioners urge this Court to reverse legal and factual findings of bad faith on their part in light of the obvious inference to the contrary raised by their own misconduct. To permit these petitioners to raise a defense of official immunity under these circumstances would denigrate that doctrine and eviscerate the damage remedy provided by 42 U.S.C. § 1983.

2. The disclosure of a public accident report to respondent's father constituted activity protected by the First Amendment to the United States Constitution.

Petitioners urge judicial repeal of the balancing test mandated by *Pickering v. Board of Education*, 391 U.S. 563 (1968), in favor of a *per se* "rule of expectation" which would justify the discharge of any public employee who criticizes a superior regardless of other relevant circumstances. This argument is premised upon the proposition that any criticism of a superior must necessarily result in such disruption and disharmony as to outweigh the countervailing interests of the public employee in commenting upon matters of public concern. Therefore, a public employee who criticizes his superior assumes the risk that the consequences may entail his termination from that employment. Authority for this novel approach is said to derive from the Third Circuit Court of Appeals' opinion in *Sprague v. Fitzpatrick*, 546 F.2d 560 (3rd Cir. 1976).

In *Sprague*, a first assistant district attorney was discharged for criticizing the district attorney in connection with the latter's explanations to members of the news media of a recommendation which he had made in a criminal case. The court emphasized that the first as-

sistant functioned as the district attorney's "alter ego." He assisted in formulating policy, maintained responsibility for daily administration of the office and for coordination of the various units within the office, and acted in the district attorney's place in the latter's absence. Alluding to the necessity for discipline and harmonious working relationships, the court noted that the crucial variant in the *Pickering* balancing function appeared to have been "the hierarchical proximity of the criticizing employee to the person or body criticized." *Sprague* at 564. In light of the unique relationship between the district attorney and his first assistant, the court concluded that the *Pickering* balance weighed in favor of excluding the criticism from the ambit of First Amendment protection there.

The Fifth Circuit Court of Appeals has given similar weight to the necessity for the maintenance of harmonious working relationships where the employee occupies a position of trust and confidence *vis à vis* the employer whom he chooses to criticize. *Abbott v. Thetford,* 534 F.2d 1101 (5th Cir. 1976), dissent adopted *en banc,* 529 F.2d 695, 702 (5th Cir. 1976). Neither of these cases, however, establishes a *per se* rule prohibiting employee criticism of an employer. Rather, each explicitly applies the *Pickering* balancing test and strikes the balance in favor of the defendants given the peculiar matrix of circumstance presented.

Indeed, the Court of Appeals in this case cited numerous instances of its own precedents wherein the importance of harmony in close working relationships and proper performance of the employee's duties have been stressed. While this factor is certainly a matter of concern and subject to particular scrutiny under the *Pickering* test, the courts have never suggested consideration of this factor to the complete exclusion of other circum-

stances. Such a rule would completely vitiate the *Pickering* test which requires "a balance between the interests of the (employee) as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* at 568. Thus, while the degree of confidentiality between the parties inherent in the particular employment relationship is a relevant factor, it is simply one variant in the overall *Pickering* calculus. *C. F. Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, ____ U.S. ____ (1980).

In the case at bar, the *Pickering* variants were substantially different from those present in *Sprague, supra,* and *Abbott, supra.* Respondent was not the "alter ego" of the petitioners. While the petitioners were the ultimate superiors of respondent, neither occupied a close daily working relationship with him. Moreover, respondent took no part in the formulation of policy nor performed other types of functions which would necessarily be impeded by reason of his disclosure to his father of wrongdoing on the part of his superiors. Indeed, the record is totally devoid of any evidence of adverse impact on the ability of the department to perform police services subsequent to the judicial reinstatement of respondent. Most importantly, however, the *Pickering* test is designed to protect the viability of legitimate state functions, not state action which is patently illegal such as the conduct involved here.

The courts below quite properly assessed all of the factors of the *Pickering* calculus. The components of the respondent's interest in communicating information to his father included the fact that an official document was falsified, the appearance of the respondent's signature on the falsified document without his consent, the chilly reception of his internal complaints, and the "time,

place, and circumstances" of the disclosure. Arrayed against these factors was the theoretical threat to discipline within the police department should evidence of official malfeasance by superiors be disclosed to the public. It would seem self-evident that the balance should be struck in favor of protecting this disclosure.

Indeed, as noted by the Court of Appeals, petitioners' assumption of risk argument would portend an absurd result: The more shocking the conduct of the superior, the more protection he would receive from disclosure of that conduct to the public. Surely such an anomalous result cannot derive from sound constitutional analysis.

In sum, proper concern has been shown by the courts below for protecting the proper and efficient performance of police services. The ability of officers within the University of Georgia Police Department to objectively investigate and report traffic and other offenses was enhanced by protecting the disclosure of official misconduct. Officers can be confident in the future that the results of their investigations will not be perverted to satisfy the personal or political interests of their superiors. The decisions below also vindicate relevant state disclosure laws and bolster the administration of local court systems by insuring equal access to correct investigative information by all parties regardless of their identity or political influence.

In sum, the argument advanced by petitioners clearly disserves the public interest and undermines the viability of the *Pickering* rule. It should be repudiated.

3. The jury award of compensatory damages was supported by the evidence.

Petitioners contend that the ruling of *Carey v. Piphus*, 435 U.S. 247 (1978), precludes an award of compensatory

damages to the respondent in this case. That case simply held that traditional common law court rules of damages should apply to § 1983 cases when such rules provide a complete remedy. The award of compensatory damages in this case is totally consistent with such traditional common law damage remedies.

First, as noted by the Court of Appeals, ample evidence was adduced to support the finding of intangible injury in the form of mental pain and suffering. The fact that the respondent ultimately prevailed in the political campaign which the petitioners sought to abort in no way diminishes the mental anguish caused to respondent by petitioners prior to judicial intervention and his ultimate election. Malicious acts giving rise to this intangible injury included: (1) penalizing respondent for seeking political office despite petitioners' actual knowledge of the legality of respondent's candidacy; (2) making public statements designed to injure respondent's candidacy and reputation; (3) submitting a falsified official document to a state agency over respondent's signature and rejecting respondent's protest of that action; (4) accusing respondent of violations of law and professional ethics; (5) threatening and initiating a criminal investigation of respondent; (6) threatening litigation and physical violence; (7) firing respondent in a heavy-handed fashion after summoning him to a midnight meeting; (8) publicly accusing respondent of breaching confidences for political purposes; and (9) corruptly creating an after-the-fact "policy" to justify their actions. All these factors coupled with the resulted adverse impact on respondent's campaign suffice to support the compensatory award. Mental anguish in this case was not "presumed" but rather necessarily inferred from the circumstances presented under proper instructions.

Moreover, *Carey v. Piphus, supra,* would not exclude "presumed" damages in this action. An important aspect

of this case concerned the defamation of respondent in the printed media because of his exercise of First Amendment rights. As noted by Justice Powell in *Carey v. Piphus*, common law defamation *per se* permits an award of presumed damages because false printed statements by their nature are likely to cause mental and emotional distress, as well as injury to reputation. *See* Ga. Code Ann. § 105-702. Thus, under the circumstances of this case, it would seem that the jury would have been entitled to presume damages.

In sum, as noted by the Court of Appeals, the compensatory award was supported by sufficient evidence tendered to the jury under appropriate charges. Accordingly, the jury verdict should not be set aside.

CONCLUSION

For all of the foregoing reasons, the Petition for Issuance of the Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case should be denied.

Respectfully submitted,

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